

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF MINNESOTA

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5 In re: ) Civil 05-MD-1708 (DWF/AJB)  
6 )  
7 GUIDANT CORPORATION ) STATUS CONFERENCE  
8 IMPLANTABLE DEFIBRILLATOR )  
9 PRODUCTS LIABILITY )  
LITIGATION, )  
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10 This Document Relates )  
11 To All Actions ) 9:00 o'clock, a.m.  
12 ) March 8, 2006  
13 ) Minneapolis, Minnesota  
14 -----

15 BEFORE THE HONORABLE JUDGE DONOVAN W. FRANK

16 UNITED STATES DISTRICT COURT JUDGE

17 STATUS CONFERENCE PROCEEDINGS  
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1 (In open court.)

2 THE COURT: You may be seated. Thank you. I  
3 will simultaneously greet each one of you and then I  
4 will apologize for the late start. And actually, in  
5 recognition of that, when I set up the new schedules for  
6 the next status conference, both the one in person, like  
7 the one today, and we have been setting up if we needed  
8 it, at least one telephone conference within the month's  
9 span for any miscellaneous or unresolved issues, I'll  
10 going to set that up, and I am going to set the next  
11 in-person conference to begin at 9:15, not 9:00.

12 I will first indicate that we haven't, have  
13 not had, even though Magistrate Judge Boylan is not  
14 seated with me, he was present this morning for our  
15 get-together with the lawyers for each of the parties.  
16 He has a personal commitment. His absence should not be  
17 construed as a change in approach.

18 We will continue to both stay involved. And  
19 I asked him to stay up to speed as any discovery or  
20 settlement issues come up, either in individual cases or  
21 globally, so that he stays, and I stay conversant with  
22 the ebb and flow of the status of the case. So, his  
23 absence doesn't mean we have made some change. That is  
24 not the case.

25 What I would like to do is just kind of set



1 the stage for what I think will be a relatively short  
2 status conference, if it is measured by the number of  
3 issues in dispute. But, I would like to just bring  
4 everyone up to date on a couple of issues, some are  
5 noted in the joint agenda for today, some are not.

6 First of all, there was a -- if you go to the  
7 website, there was about a ten-day delay on putting up  
8 on the website some issues, mostly stipulated on  
9 discovery, with one issue that I decided that was not  
10 stipulated, and that was my doing, not the lawyers.

11 To the extent it is of any concern to anyone,  
12 I had my first and second days of sick leave in 21 years  
13 as a judge two weeks ago. And I was in fact down for  
14 the count. So, there was a short delay in that, as I  
15 kind of got back up to speed.

16 You might hear a bit of selective hacking  
17 this morning. I am not contagious, so I think I will do  
18 my best to protect you all, but I think I have long  
19 since passed that stage.

20 On the website and one of the pretrial  
21 orders, there was a reference to and a schedule set for  
22 the selection by the Court with input from the parties.  
23 We can use a number of different words, bellwether  
24 cases, representative cases. And at least in one of the  
25 motions filed that I will be hearing this afternoon at

1 1:00, because there are two remand motions set to be  
2 heard with oral argument at 1:00, unless for some reason  
3 that schedule is changed. But, that is the plan that --  
4 unless there is by mutual agreement some decision to  
5 move those up earlier, we wouldn't be moving them later.

6           There was some discussion, and in fact one of  
7 the other motions that I will designate as -- there are  
8 two files, the -- I will call -- the Wright case, both  
9 with respect to the individual case, and the case  
10 against Guidant and Boston Scientific, that certain  
11 people are in, or without the bellwether cases. That  
12 decision has been made. What will happen as a result in  
13 part of today's hearing, and in part of input I received  
14 before today from the Committees for both parties,  
15 whether it is an issue addressed to me this morning or  
16 it is something outstanding, including but not limited  
17 to discovery, any disputed discovery issues and the  
18 establishing or modifying any discovery dates, as long  
19 as they don't disrupt the trial dates that have already  
20 been established. I will set up a selection process for  
21 those cases, which isn't synonymous with saying I'm  
22 going to pick five cases. And it won't be terribly  
23 inconsistent with similarly-situated cases and MDL's  
24 across the country. But, that order will go out at the  
25 very latest, Monday of next week, perhaps by Friday of

1 this week, and so included in it will be any unresolved  
2 issues or disputed issues today, any stipulated issues,  
3 and a protocol or system for the selection of those  
4 cases based upon the order that has previously been  
5 entered, and the response from the parties I have  
6 received.

7           So, the orders, if I haven't made it clear,  
8 will not include specific cases just yet, it will set  
9 the system by which we are going to select them based  
10 upon the input I've received. And I think you will see  
11 when I do that, and I will leave it to counsel whether  
12 there is anything more to be said about the process,  
13 itself, that I won't be re-inventing the wheel, I will  
14 be setting up what I think is a fair process to begin  
15 the selection process, itself, as opposed to saying:  
16 Here are the four or five cases we are going to start  
17 trying.

18           And so, I think everyone will be able to see  
19 the process that is in place and then what contact, if  
20 any, you have with the respective counsel, I guess I  
21 leave it to the lawyers representing individual clients  
22 or client. So, that will be, necessarily, a part of the  
23 Order.

24           Although, as I assured the lawyers earlier  
25 today, I have no intentions of moving the established

1 trial date, certainly not moving it further out, that  
2 won't happen. You won't see any modification of that.  
3 Whether or not anyone by agreement or court decision  
4 will be ready prior to that time because there are a  
5 couple of outstanding motions that once briefing  
6 schedules are established, I will be, either with or  
7 without oral argument, be making rulings on what  
8 sometimes we call the expedited track for dispositive  
9 motions, because there is some request in a couple of  
10 cases as the lawyers here know for expedited discovery  
11 and expedited trial dates.

12 And so, separate from the bellwether  
13 selection, there are some rulings that have to be made  
14 in the immediate future. But, I don't see any of those  
15 issues that would result in a modification of --  
16 essentially, the schedule is in place to move towards  
17 trial dates not later than March of this next year.

18 Because as we maybe discussed in the past,  
19 whether it is an MDL case or an individual case,  
20 meaningful dates are really what get things done and  
21 move things along. So, that is kind of a brief  
22 overview.

23 What I intend to do for the morning is go  
24 through the agenda. I will say this, it really,  
25 depending on your point of view, I guess, it may or may

1 not affect most of you in the room, except for one or  
2 two parties.

3 With respect to an Order that has been signed  
4 by Judge Rosenbaum and myself in the last two days, and  
5 in fairness to both, the individual Plaintiff in that  
6 case and the Defendants, they have had that pending  
7 before us. These are the two cases I have already  
8 mentioned, the two Wright cases, one with Boston  
9 Scientific, one without.

10 Those have been in front of us. And in the  
11 last two days, we have jointly signed what is referred  
12 to, administratively, as the Related Case Order. And  
13 what that means, because it really is unrelated to the  
14 unique features of an MDL, that issue comes up when a  
15 case is filed and each district in the country handles  
16 it a bit differently, but in a mostly similar way.

17 I will be handling both cases. Related case  
18 should not be treated synonymously with consolidation,  
19 for example, that is yet to be decided. But, it is a  
20 way to coordinate the two cases so that they get fair  
21 treatment. But, to the extent there are issues in  
22 common with one or all of the other MDL cases, that one  
23 doesn't adversely affect the other.

24 So, there may or may not be questions about  
25 what does it mean, because most lawyers know it is an

1 administrative doctrine on a related case, to better  
2 coordinate those cases. But, that has been done in the  
3 last couple of days. And I will proceed appropriately,  
4 based upon the relief requested, to set up any necessary  
5 briefing schedules, make any rulings on the discovery  
6 requests, and with input from counsel, either direct  
7 from me or via my calendar clerk Lowell Lindquist.

8           The other individual in the courtroom that  
9 some of you may have talked to by phone, and Laura, you  
10 have had probably sparing attendance at some of these.  
11 Laura Johnson is my Senior Lawyer Law Clerk and she has  
12 been with me from the beginning on the MDL and will  
13 remain as the contact. And actually, any work done on  
14 the file with me, even if it involves Judge Boylan, the  
15 kind of -- Laura, Ms. Johnson will be working with me.  
16 There we have it.

17           I think we can go right down the agenda. As  
18 we did last time we were here, I will check in with --  
19 sometimes I solicit it, sometimes it is unsolicited if  
20 someone at the end of the agenda -- because I think it  
21 may move, unless there are issues unanticipated, there  
22 are at least one, maybe two that have some oral argument  
23 attached to it, I believe. And I will soon find out if  
24 that understanding is correct. And then I will just do  
25 a check-in with you at the end.

1                   Status conferences aren't very interesting,  
2   are they? When they explained to me that there was  
3   probably a group of high school students that were  
4   visiting, I said, well, I don't think anybody has  
5   explained to them what typically happens at a status  
6   conference, unless they thought there was some kind of  
7   celebrity lawyers here today they would like to get some  
8   autographs, I didn't see them roving through the crowd.  
9   I hope they found what they were looking for.

10                   So, does Plaintiff wish to step off the curb  
11   first? And whether or not there is -- whatever, I guess  
12   seems to be the most useful way to go through this and  
13   the best use of our time, I will leave that up to  
14   counsel.

15                   MR. ZIMMERMAN: Sure, thank you, Your Honor.  
16   May it please the Court? The first item on the agenda  
17   is the number and status of cases transferred into the  
18   MDL.

19                   THE COURT: Can I just interrupt you for one  
20   moment? I think you can stay right there. One thing  
21   that did occur since the last time we were together, and  
22   even though I individually addressed the same letter to  
23   twenty plus State Judges around the country, so it  
24   wasn't a form letter to twenty plus State Trial Judges.

25                   The letter, itself, is up on the website that

1 I sent to each of the Judges. And I won't characterize  
2 it, but I did an inventory, and then sent a letter out  
3 to each -- I would call it, in a constructive way,  
4 reaching out to the State Trial Judges that in some form  
5 or another are involved or have a case, based upon our  
6 records. And I have had some responses. I would say  
7 all constructive and positive, in terms of each of us  
8 recognizing we have some responsibility to try to  
9 coordinate things so that the left hand is aware of what  
10 the right hand is doing and we don't tread over the same  
11 ground, which almost always relates in delay and expense  
12 to parties in the case.

13 So, the letter is up on the website, even  
14 though -- but, it was individually sent to each Trial  
15 Judge. And I have either had phone calls or letters  
16 from a number of them since it was sent a few weeks  
17 back. Go ahead, Mr. Zimmerman?

18 MR. ZIMMERMAN: Thank you, Your Honor. The  
19 first item is just an update for the Court and counsel  
20 here may not be aware that 169 cases have now made their  
21 way into this MDL on the subject of Transfer Orders.  
22 That does not include the two cases that have now come  
23 in on a related case basis, the two Wright cases, one  
24 against Boston Scientific, and one against, I guess,  
25 Guidant.



1 THE COURT: One, yeah. One is in there.

2 MR. PRICE: One is already in the MDL, Your  
3 Honor.

4 THE COURT: One is in there.

5 MR. ZIMMERMAN: Sure. And Mr. Pratt will  
6 comment further on that. We are aware of, obviously,  
7 the filing of Guidant where they indicate there's about  
8 1,700 claims that they are aware of, 2,400 or 2,500  
9 potential people. That was just a matter of information  
10 contained in the 10K, 10Q filings with the SEC.

11 We don't know if those cases will or will not  
12 find their way here, but we can expect a number of other  
13 cases will be coming our way as these proceedings  
14 mature. But, at this time, Your Honor, we have 169  
15 cases plus, then, one additional case that we're aware  
16 of, the Wright case. And I think Mr. Pratt wanted to  
17 comment further on that.

18 THE COURT: All right.

19 MR. PRATT: Your Honor, Tim Pratt for  
20 Guidant. Just to add one embellishment to Mr.  
21 Zimmerman's presentation, in addition to those cases,  
22 there are 24 cases in the mix.

23 There are seven cases that have been captured  
24 by Conditional Transfer Orders for which an objection  
25 has been raised, or an opposition has been filed. There

1 are seven of those. Four of those are actually up for  
2 argument at the next JPML live hearing. In addition to  
3 those seven, there are 17 additional cases that have  
4 just been captured by tag-along motions, or will be  
5 captured in a tag-along motion fairly quickly. So, you  
6 have got the 169, then a total of 24 that is sort of in  
7 line, potentially, to end up with you, as well.

8 THE COURT: Thank you.

9 MR. ZIMMERMAN: I missed a point. There are  
10 17 that have been tagalongs?

11 MR. PRATT: Yes.

12 MR. ZIMMERMAN: How do you get from 17 to 24?

13 MR. PRATT: Because there are an additional  
14 seven that were earlier the subject of CTO's for which  
15 an objections of opposition --

16 THE COURT: They're going to rule on them.

17 MR. PRATT: The Panel will decide those  
18 seven.

19 MR. BECNEL: Judge? Daniel Becnel.

20 THE COURT: Yes?

21 MR. BECNEL: I just gave Mr. Goldser another  
22 death case that I've filed directly here, so that will  
23 be filed within the next day or so, so it will be here.

24 THE COURT: Thank you. Mr. Zimmerman?

25 MR. ZIMMERMAN: Thank you, Your Honor.

1           The next issue, Your Honor, is an item from  
2 paragraph five of PTO -- paragraph 15 of PTO-5. And it  
3 is the proposed final discovery deadlines in light of  
4 the provisions of this Order.

5           What we've laid out in the agenda that is on  
6 the Court's website, or filed -- I don't know if it is  
7 posted on the website yet, but it is filed and  
8 available, is the Plaintiffs' proposal and the  
9 Defendant's proposal for those deadlines for the  
10 discovery.

11           It is my understanding, and correct me if I  
12 am wrong, that the Court is now prepared to rule on that  
13 and that will be out in the orders that you are going to  
14 be issuing on Friday or Monday. And I don't believe you  
15 want further clarification of that.

16           THE COURT: Well, if I may ask one question,  
17 and I don't want to kind of open up Pandora's box,  
18 because the question I think I have relates -- would be  
19 a question typically asked at a scheduling conference,  
20 even if we were all here in one, you know, one  
21 individual case. And that is, on the dates, because --  
22 separate from the issue of what the Pretrial Order  
23 established, and for benefit of counsel there are other  
24 lawyers in the room, and I will make sure these things  
25 also go up on the web. And to the extent this joint

1 agenda isn't there, they usually put it out when I  
2 direct either Lowell or one of the people in the Clerk's  
3 Office to do it, and I don't believe that I did that  
4 here.

5 A question that I have, and I was going to  
6 say before I got sidetracked here, for the benefit of  
7 everyone else in the courtroom but the Committee  
8 lawyers, because they know what this states and maybe  
9 all of you do, there is no attempt by either party to  
10 delay or move anything around. I suppose it could be  
11 said that the Plaintiffs have suggested we move up some  
12 of the trial dates earlier than March of 2007; but, that  
13 is not my question.

14 I did want to ask the question that is not  
15 unique to civil litigation, and that is, with respect to  
16 some of the dates that you are proposing that were left  
17 until today, or weren't covered in any prior order that  
18 won't really effect the dates that we have established,  
19 it certainly won't push anything back, the role of  
20 expert testimony and reports in the dispositive motion  
21 practice down the road, when the discovery is done -- in  
22 other words, occasionally lawyers will say, well, in  
23 other words, I see these dates pressed right up  
24 against -- at least Defendant's dates up against the  
25 December dispositive motion deadline, not to be confused

1 with the expedited track we have on preemption and other  
2 issues. But, I am just curious to know if one or both  
3 of you are sitting there saying, well, you know, we  
4 haven't really told the Judge, yet, but there are going  
5 to be some Daubert -- some big ticket items, here.

6 MR. ZIMMERMAN: You said Daubert? What is  
7 that again?

8 THE COURT: Yeah. Well, I know people see it  
9 in their sleep, or Article VII issues. But, I don't  
10 need a long explanation. And it may be an unfair  
11 question, because I should have brought it up this  
12 morning, because it was on my mind.

13 I just want to make sure that I am not doing  
14 something or that I am anticipating something that  
15 wouldn't tamper with some of these dates. In other  
16 words, we get out a few months and one or all of you  
17 say: This expert witness issue is dispositive of a  
18 variety of things, and that has to be decided as a part  
19 of this.

20 I may come up with the same dates, anyway, no  
21 matter what the issues are. It won't adversely affect  
22 the other deadlines we have.

23 MR. ZIMMERMAN: The way the Plaintiffs see  
24 it, Your Honor, and again I think we need some,  
25 probably, some dialogue with the Defense on this issue.

1 We see the bellwether instructive trial preparation,  
2 experts, whatever that will be required as being on one  
3 very fast track.

4 We see anything in the generic sort of phase  
5 where these are going to be available generically for  
6 cases if they don't resolve here that get into a  
7 remanded point of view. In other words, case -- of  
8 generic experts available for individual cases to be  
9 very much a separate track that we are really not  
10 focused on right now.

11 What we are really focused on is preparing  
12 for the March trial date and whatever experts and  
13 whatever discovery and whatever hearings might surround  
14 those illustrative cases to be focus of what we do here,  
15 now.

16 At some point in time, if the bellwethers and  
17 the instructives don't get us to the end of the case by  
18 being instructive enough to help us resolve the case in  
19 the main, and we have to get into a generic sort of  
20 expert protocol, we will then be reviewing how to do  
21 that, what to do, and what track to do that -- on a  
22 different track. I don't know if that is hitting the  
23 Court's concern or not.

24 THE COURT: I guess mine was kind of an  
25 inartfully put question, but I don't need to have the

1    answers to all of these to put in some meaningful  
2    deadlines, but I would, without intending to  
3    oversimplify or generalize about some of these  
4    significant and oftentimes complex issues -- I mean, on  
5    my take on these cases so far, I think early on, whether  
6    we call them case specific or generic experts -- and I  
7    do apologize for not bringing it up earlier today. It  
8    is not a disputed issue now, and I don't think it is  
9    really going to affect anything I do for the next few  
10    days, but I think liability, so-called liability experts  
11    are going to -- those issues are going to become fairly  
12    clear-cut, I think, early on. And what fits one case  
13    may fit a lot of cases. Causation may be another  
14    matter, just as we take a look at a typical, you know,  
15    case, or products case with medical devices.

16                I don't need kind of the micro explanation  
17    today. Oftentimes a lawyer will, either by letter or  
18    phone call, as a case I'm hearing next week, send in a  
19    letter. And the lawyers oftentimes agree, saying, well,  
20    why don't we tell the Judge that we think this expert  
21    witness issue may be dispositive of all sorts of things?  
22    And so, the earlier he can get to it, the better off we  
23    are all going to be?

24                I just want to make sure we don't get out --  
25    when I get these dates set, we have got plenty of time,

1 I think, to tweak them. Tweak doesn't mean push back,  
2 so that, one, it doesn't interfere. So we don't have a  
3 lawyer in good faith saying, Judge, we didn't see it  
4 coming, so this dispositive motion date is no longer  
5 realistic because we need the depo of this expert, and  
6 we need -- because I am really quite confident that a  
7 number of these liability issues are going to get  
8 addressed in a pretty straightforward way without  
9 involving large numbers of experts. But, we are soon to  
10 find out. So --

11 But, I think you did answer my --

12 MR. ZIMMERMAN: Yeah, and we understand that.  
13 And we certainly have to put more detail into it, but we  
14 understand a certain amount of experts are going to be  
15 required for these bellwether trials. And we are  
16 preparing them. And plenty of time will be given for  
17 their reports and discovery so we meet that March date.  
18 I think that is your concern.

19 THE COURT: All right, Mr. Pratt?

20 MR. PRATT: I had a position I was going to  
21 express, then I heard Mr. Zimmerman saying the same  
22 thing, so I had to re-evaluate whether mine was right or  
23 not, but my sense is similar to that, Your Honor.

24 Let me explain this. As I look at the expert  
25 witness issue, there is a front-load process and a



1 back-load process. I'm actually more concerned about  
2 the front-load process in terms of getting meaningful  
3 information so that we can identify which experts we may  
4 need, what information we need to get to them, so we can  
5 properly evaluate and prepare them for their designation  
6 and ultimate deposition.

7           So, on the spectrum of things from now until  
8 then, I think the identification process needs to be  
9 sort of moved a little bit toward the back end so we all  
10 know what cases we are dealing with, what Plaintiffs we  
11 are dealing with, what information they may want for  
12 their experts, what information we need for our experts.  
13 So, on the spectrum, I am worried a little bit more  
14 about the front-load process than of the back-load  
15 process.

16           I don't believe, and I have been thinking,  
17 here, that there are any dispositive motions that we  
18 would file for which it is essential that we have  
19 identification of experts before that, save one. I  
20 think there will be some Daubert-related issues. It may  
21 be too early to know that for sure. I think that can be  
22 dealt with toward the later end phase of the process,  
23 specific to any bellwether cases if we get selected.

24           So, I am actually more concerned for a  
25 variety of reasons of getting meaningful information on

1 the front-end, whether it is a Master Complaint, whether  
2 it is knowing enough about the Plaintiffs' cases to  
3 evaluate which ones ought to be selected for bellwether,  
4 so we can sort of knowledgeably know which cases go into  
5 which slot.

6 THE COURT: Thank you.

7 MR. ZIMMERMAN: The next item, Your Honor,  
8 really was the use and value of generic experts and the  
9 use and value of case specific experts. I think we  
10 really hit that.

11 THE COURT: Yeah, and in fairness to both  
12 sides of the aisle, you probably felt compelled to put  
13 it on there because I rolled it into an Order that I did  
14 some time ago.

15 MR. ZIMMERMAN: Exactly.

16 THE COURT: So just if there was an issue, as  
17 soon as it becomes an issue, or a position by a party, I  
18 know what it is.

19 MR. ZIMMERMAN: Right. And that is why we  
20 put it up there, Your Honor. And I think we have kind  
21 of in good faith given you kind of the view from each  
22 side. And I think it is pretty clear where we are  
23 going. And we are probably not that far apart at this  
24 point as to how we see it in a concept way.

25 The coordination of State and Federal

1 discovery, including the coordination of motion practice  
2 and any trial settings, it is the intent of the Court to  
3 reach out to State Judges in proceedings in this matter.

4 This is also from your agenda --

5 THE COURT: Now, I didn't intend to sound  
6 like I was going to have a campfire and sing kumbaya.  
7 You know, that really wasn't my intent. But, I mean, I  
8 did mean it in earnest, and I still do. And in part,  
9 you know, it's the letter that I sent out.

10 MR. ZIMMERMAN: Right, and the point from  
11 that is this was from your agenda. You did send out the  
12 letter. We have all seen it. I am sure response has  
13 been coming to you, as it might.

14 We discussed that briefly in Chambers, and it  
15 appears that coordination is not a major problem at this  
16 point in every place but potentially one. So, enough  
17 said on that, I believe, unless Mr. Pratt has anything  
18 he would like to add, or the Court.

19 THE COURT: Well, I would just say that the  
20 number of responses that I got are the responses I was  
21 hoping for, and the responses that I would like to think  
22 I would have done when I was on the State Court. And  
23 that is, in part, I thought it was very interesting, a  
24 number of the Judges said, well, we are going to take  
25 your letter and give it to the lawyers, because we will

1 do our part. We have our responsibility, too. We will  
2 do our part to coordinate this, as long as you do. So,  
3 I mean, I think that's -- as long as we are moving  
4 forward, I just have a concern that nothing that could  
5 happen could adversely -- or slow down what we are  
6 doing, because I think that is what frustrates clients.  
7 So, Mr. Pratt?

8 MR. PRATT: With respect to the State/Federal  
9 coordination, I think you know this, Your Honor, that we  
10 continue to have activity in Nueces County, Texas. We  
11 have a trial setting.

12 THE COURT: It got moved once.

13 MR. PRATT: Yes, it got moved once. It is  
14 now set for April 10 of this year in front of Judge  
15 Hunter down there. I know Judge Hunter got your letter.  
16 I don't know if he is one of the responders or not --

17 THE COURT: He is not. He and I talked. We  
18 haven't talked since the letter. I called him up and we  
19 chatted, I will say that, twice. So --

20 MR. PRATT: So, really, the only area in  
21 State Court where there is any activity, or indeed,  
22 really, any potential in my view to interfere with what  
23 you are trying to accomplish here at the MDL is in  
24 the -- you know, one set of cases set for trial to start  
25 on April 10 in front of Judge Hunter.

1           I don't think we even have another trial  
2     setting in any State Court case involving any of these  
3     products until August of this year. And we have no  
4     State Court Judges, you know, other than what we have in  
5     Nueces County, who are hammering us for scheduling  
6     orders, rocket dockets, or things like that.

7           We really -- amazingly, in an MDL, from my  
8     experience, you typically see that. Here, I think, we  
9     are not getting a lot of activity in State Court. And  
10    part of it is due to Your Honors reaching out to them  
11    and letting them know what you are trying to accomplish  
12    here. But, I just wanted to remind you, though, it is  
13    still not a perfect world.

14           THE COURT: Oh, it certainly isn't.

15           MR. ZIMMERMAN: Two sub-issues on that, very  
16    small sub-issues. There are some motions before Your  
17    Honor, as you know, for remand to State Court that are  
18    going to be heard today. So, that would be the caveat,  
19    if you will, to that, or at least an update on that.

20           And one of the things that I don't see on the  
21    agenda, and I don't even particularly know the status,  
22    but it is a minor issue having to do with an order  
23    regarding direct filing of cases. If I could just say  
24    what that is? I think it is in front of you.

25           THE COURT: Certainly.

1                   MR. ZIMMERMAN: One of the things that  
2 happens in MDL's is there is always the option, instead  
3 going the tag-along route, filing it in a certain  
4 District, having it come to the MDL and be tagged along  
5 and brought here, is there is the option to directly  
6 file a case into the District of Minnesota, and then as  
7 a related case it comes in.

8                   What we had proposed as a PSC is that if that  
9 is a chosen course, there would not be a need to have  
10 local counsel. And it kind of allows people not to have  
11 to associate with local counsel for the purpose of  
12 simply that direct filing.

13                  Now, I suspect at the time that case might  
14 get remanded, the Court may want to revisit that  
15 question, or maybe not. But, we thought it would be a  
16 lot easier and more expeditious if -- and I think we put  
17 a proposed order to the Court -- if the Court could  
18 enter an order and that people would know, that if you  
19 are going to direct file, which is an option, that you  
20 don't have to associate, but you can, but you don't have  
21 to associate with local counsel and enter into shared  
22 agreements of any kind. You can do it on your own. And  
23 kind of, that order that says everyone is admitted pro  
24 hac vice, from the tag-along process would happen in a  
25 direct-file context.

1           THE COURT:   And actually, without knowing the  
2   response of --

3           MR. ZIMMERMAN:   And the Defendants agreed.

4           THE COURT:   Yeah, because it's a practice  
5   often seen in other MDL cases across the country, in my  
6   experience.

7           MR. ZIMMERMAN:   Yes, Your Honor.   So, that  
8   was -- that is kind of that subpoint of that  
9   coordination issue.

10          THE COURT:   All right.

11          MR. ZIMMERMAN:   The next is class  
12   certification discovery motions in light of provisions,  
13   one of the things Mr. Pratt has been saying to us, he  
14   said it in chambers, he said it to me actually outside  
15   of the courtroom on class was the need for a master  
16   complaint, so he knows where the class is, what the  
17   allegations, who the class reps might be, things like  
18   that.   And we had said, you don't need it.   It may not  
19   be necessary.

20                 We want to revisit that issue, because I  
21   think I understand a little bit more of where the  
22   Defense is coming from on this.   So, it is our position  
23   after hearing from Mr. Pratt that we would like to  
24   revisit that question within our, Lead Counsel and PSC  
25   to determine if we can give some clarity to class and

1 where we are going with class, and if within a master  
2 complaint we can do that, we may be willing to modify  
3 that position, which at this point we don't need to do  
4 that.

5 So, I just wanted to -- under the agenda of  
6 2E that talked about class certification, we just wanted  
7 to say that right up front so we can perhaps move that  
8 forward on an agreed basis, as opposed to an adversarial  
9 basis.

10 THE COURT: Mr. Pratt?

11 MR. PRATT: Yes. We have been saying all  
12 along that in structuring the early stages of an MDL, we  
13 need to know what issues we are dealing with. We need  
14 to have consistent targets to aim at. And that is why I  
15 think E and F fit in this together. One is the class  
16 certification side of it, and F, of course, deals with  
17 the filing of a master complaint and a master answer.

18 What we are finding with respect to the  
19 preemption motion that we are going to file on April 1  
20 is that there isn't a consistent target out there.

21 THE COURT: Excuse me.

22 (Discussion off the record.)

23 MR. PRATT: So, what we have been trying to  
24 say from the very first conference that we have had  
25 here, we just need to know what the consistent targets



1 are that we are aiming at.

2 And I suggested to Your Honor that we are  
3 getting a little bit ahead of that by asking us to file  
4 dispositive motions directed to common issues without a  
5 fair determination of what those common issues are,  
6 setting bellwether cases that may sort of predict  
7 outcomes in a setting where we really don't have one  
8 complaint to deal with.

9 So, I appreciate what Mr. Zimmerman said,  
10 they are going to take a look at the class certification  
11 situation again. I mean, for every six reasons you do  
12 it this way, there are six reasons not to. I agree that  
13 we ought to have that dialogue with them. We may be  
14 able to come to some resolution on where we want to go  
15 with respect to class certification.

16 I do believe it would be helpful, and I think  
17 Ms. Cabraser agrees with this, but she is certainly  
18 eloquent and wise enough to speak for herself.

19 We need to have some kind of a master  
20 complaint for two reasons. One, so we know with  
21 predictability what issues are in this case. We can  
22 then direct our motion practice and our bellwether  
23 selection process from sort of a master complaint.

24 The other reason is, it makes it easier for  
25 people to maybe perhaps come in. We have a master

1 complaint where people check off, you are claiming this  
2 allegation, and that allegation. We have a master  
3 answer to it. That is not an unusual thing to have in  
4 an MDL. We don't have it here.

5           So, I think all of those things, certainly  
6 the class certification, we look forward to any dialogue  
7 with Mr. Zimmerman and his colleagues on the Lead  
8 Counsel Committee. Maybe we could reach some resolution  
9 on that. But, we, yet again, Your Honor, would like to  
10 have an order that requires them by a date certain, now  
11 some months into the MDL, to come up with a master  
12 complaint.

13           THE COURT: And actually -- go ahead, Mr.  
14 Zimmerman. What I heard this morning, as we discussed  
15 it, and it is not a new topic, but I think it was  
16 presented a different way this morning, at least from  
17 where I saw it. The time expended by Plaintiffs now, if  
18 they consider by some -- in some avenue or some way  
19 doing a master complaint is going to expedite a variety  
20 of other issues, that appears to me to be the issue.

21           I mean, that is what Mr. Pratt is suggesting  
22 at the outset, but it has more impact, more  
23 implications, it seems to me, the discussion I heard  
24 this morning, than just resolving one way or the other,  
25 the class issue. It may identify some other issues for

1 other cases.

2 MR. ZIMMERMAN: Yes. But, the problem we  
3 have in master complaints is not -- we want to simplify  
4 as much as we can. If someone wants to file a complaint  
5 and have a check-off complaint, or a check-off answer,  
6 that all makes perfect sense.

7 The problem is, new claims, or claims that  
8 aren't contained within the master complaint, we don't  
9 want to jeopardize or in any way interfere with those  
10 claims, like the claims we just talked about in the  
11 Wright cases. If we come up with some master complaint  
12 that is the all-encompassing MDL Complaint, we have to  
13 make sure we address that -- no? Am I wrong about that?

14 MS. CABRASER: Yes, no.

15 MR. ZIMMERMAN: I have to sometimes be  
16 corrected on that. So, we get concerned about other  
17 cases and other claims out there, and that we don't want  
18 to, by virtue of making the most common master  
19 complaint, eliminate anybody else's complaint from being  
20 part of the proceeding. Just like the Related Case  
21 Order that is coming out from Judge Rosenbaum and  
22 yourself, having to do with the Boston Scientific and  
23 the Guidant litigation.

24 So, it's with a little bit of trepidation we  
25 work on these master issues. It is a little easier with

1 class, but it is still something we can address and talk  
2 about and try and work our way through.

3 THE COURT: All right.

4 MR. ZIMMERMAN: Okay. Use and value of  
5 summary jury trials for settlement purposes.

6 Your Honor, I could go into a large speech  
7 about this. I think we issued written submissions to  
8 the Court on what we perceive to be some use and value  
9 of these, of summary jury trials.

10 I have been doing a lot of reading about it,  
11 I have participated in summary jury trials in front of a  
12 court in Cincinnati in the Telectronics case. It was  
13 tremendously successful in moving that case. I have  
14 seen it work. I am a big advocate of these kinds of  
15 procedures to try and get us to understand in a better  
16 way and in a more summary way and in a more expeditious  
17 way things like value, and things like how do juries  
18 respond, how might a jury respond to respondeat  
19 superior, liability on these facts, things like that.

20 I see tremendous value that could be utilized  
21 with summary jury trials. The countervailing point here  
22 is that, of course, we have a ramped-up bellwether trial  
23 that is going to be our focus in the next twelve months.  
24 And so, how that intersects and how that might play into  
25 that, we would love to keep that on the table, give

1 thought and consideration to it. It is like any kind of  
2 ADR. Unless you have both willing parties on some basis  
3 where they find the information to be gained from  
4 summary jury trials to be useful, or even for the Court  
5 to find that information to be gained to be useful, we  
6 don't want to go into exercises that are not useful.

7 But, I can see many ways in which summary  
8 jury trials could be useful in calculating, or what  
9 types of -- the range of damages that might be available  
10 in the minds of juries, what kinds of issues regarding  
11 non-core issues, perhaps, or even core issues, how  
12 juries may respond to it. I happen to be a big promoter  
13 and believer in it, and so does the lead counsel on the  
14 PSC.

15 MR. PRATT: Your Honor, two issues on that.  
16 One, my experience with summary jury trials is to the  
17 contrary. They take a tremendous amount of effort to do  
18 them right, of attorney resources, client resources,  
19 sometimes expert resources, to basically get your case  
20 trial ready, so you can present it to a summary jury  
21 trial.

22 And I think there is, because there is some  
23 sense that there is some artificiality to that process,  
24 it doesn't really allow that summary jury to evaluate  
25 the full complement of issues, and witnesses and

1 documents, if you would want them, a real jury, to  
2 evaluate. And maybe they are not very predictive. You  
3 may not be able to extrapolate a finding there,  
4 elsewhere. And, of course, that depends a whole lot on  
5 how they come back. I actually thought they were pretty  
6 predictive of an entire range of cases, but I only knew  
7 that after the summary jury came back with their  
8 verdict.

9           So, I think in a general way, whether they  
10 are predictive or not has to be balanced against the  
11 tremendous cost and disruption that they bring to bear  
12 on the process. So, the general way, I guess I'm less  
13 enamored of them than my colleagues on the other side of  
14 the table.

15           But, Mr. Zimmerman raised a point on the  
16 specific side of it. I mean, you really have built in a  
17 fairly ambitious schedule with bellwether trials set for  
18 March of next year. We are just going to be working  
19 ourselves to the bone to get all of the things done that  
20 you have asked us to do, and will in the upcoming order  
21 ask us to do, in that order.

22           So, I think even if you thought they could  
23 serve some purpose, I think given the approach that you  
24 have taken, Your Honor, to the setting of bellwether  
25 cases to be tried in the spring of next year, for

1    whatever purpose we hope to accomplish in those  
2    bellwether trials, I think those sort of trump any need  
3    for any intermediate summary jury trials.  So, I think  
4    in a general way and a specific way, I would urge the  
5    Court, one, basically, to say no, now and forever as to  
6    those.  Or secondarily, let's just keep it on the table  
7    so we can determine a month from now, two months from  
8    now, things have changed such that we might be able to  
9    gain some benefit from these types of summary jury  
10   trials.

11                   MS. CABRASER:  Your Honor, Elizabeth Cabraser  
12   for Plaintiffs, with Mr. Zimmerman's permission, just to  
13   the tie in the Plaintiffs --

14                   THE COURT:  Do you need his permission?  I  
15   didn't think --

16                   MS. CABRASER:  I always ask.

17                   THE COURT:  You never struck me as that kind  
18   of lawyer.  And I say that respectfully, but I don't  
19   even think Mr. Zimmerman would suggest that you need his  
20   permission.  I know exactly what you --

21                   MS. CABRASER:  I think if I don't get it, I  
22   have a Plan B, but we don't need to go there this  
23   morning.  Just to tie in Plaintiffs' points on items E,  
24   F and G, Your Honor, and to reiterate what Mr. Zimmerman  
25   has said, the point of our presentation on these issues,

1 Your Honor, is that the Plaintiffs' goal in these  
2 proceedings is to get these cases to trial, to get them  
3 to a decision point.

4 And anything that delays that process, that  
5 complicates that process, that detracts from that  
6 process, we have no interest in pursuing. We thought  
7 that a master complaint, master answer might slow the  
8 proceedings down. If they will in fact expedite the  
9 proceedings, then our view changes. We are all for them  
10 if that is going to move these proceedings forward and  
11 we are happy to do the extra work to get that done.

12 If the Defendants want clarification on the  
13 timing of class certification, or the role of class  
14 certification, for the same reason, to focus, expedite  
15 and clarify the proceedings and move us toward trial,  
16 again, we are happy to discuss with them a way to  
17 accomplishing that.

18 If summary jury trials in the summer of this  
19 year will get us to decision points before bellwether  
20 trials, if we can accomplish enough discovery, and we  
21 think we can, to make them worthwhile, and we can do  
22 them in a streamline fashion that doesn't move the  
23 litigation off track, that enables us to move ahead with  
24 trial preparation, and ADR, we are ready willing and  
25 able on the Plaintiffs' side to putting the extra energy



1     into that process.

2                 We are well aware that many of the Plaintiffs  
3     in these MDL cases, many Plaintiffs that are considering  
4     to filing their cases in the MDL would be entitled to  
5     various trial priorities, under statutes and rules in  
6     their home states, either because of their advanced age,  
7     because of their medical conditions, for other reasons.

8                 We don't want to give them any less priority  
9     as a matter of real timing than they would actually get  
10    in those proceedings. And I think by focusing on all of  
11    the pretrial matters with a view toward agreeing,  
12    wherever we can, to move the case along, we can  
13    accomplish that.

14                We are willing to be educated. We are  
15    willing to change our minds. We are willing to do  
16    whatever it takes. And I think that is the spirit in  
17    which we are taking a fresh look at a master complaint  
18    and master answer. If that is going to move the cases  
19    along, we will do it. We are willing to take a fresh  
20    look at new approaches as to how and where and when  
21    class issues are addressed. Because again, if they  
22    don't need to be addressed in order to get us to trial  
23    and decision, we won't do that.

24                If there needs to be a stipulation to get us  
25    to trial and decision on specific underlying cases, we

1 will enter into that. And I hope we will be able to  
2 report to the Court on that well in advance of the next  
3 status conference.

4 THE COURT: Well, of course, the issue that  
5 Mr. Pratt raised this morning is whether or not any of  
6 this advances the -- we will see what Mr. Pratt says,  
7 but I think they are seeking -- well, is it on or off  
8 the table? And even if we can't get the ultimate, the  
9 class issue, and even if we can't get to that, I think  
10 that everything you said, Mr. Zimmerman says.

11 A number of those issues have every potential  
12 to move this along and minimize delay. So, I don't know  
13 if -- that is kind of how you put it bluntly this  
14 morning, I think, Mr. Pratt. Well, is it on or is it  
15 off the table? Well, whether it is on or off, I think  
16 all of these suggestions you have certainly can advance  
17 this without adversely affecting individual Plaintiffs  
18 or the schedule we have got put in place.

19 MS. CABRASER: That is right. And if an  
20 answer is required to move these cases along, we are  
21 certainly not afraid to provide that answer.

22 MR. PRATT: Your Honor, just one quick thing,  
23 because I heard Ms. Cabraser talk about the summer of  
24 this year, I think maybe suggesting that would be a time  
25 for summary jury trials.

1           THE COURT: I think that is actually their  
2 proposal in that last submission I had.

3           MR. PRATT: It is March 8th, nine months,  
4 practically, after -- eight months, nine months after  
5 the first cases were filed. We have 169 cases in the  
6 MDL. We just a few days ago got the first information  
7 on almost all of the Plaintiffs. No, that is not fair.  
8 The first information on Plaintiffs, period, came just a  
9 few days ago. We had some early on in some of the  
10 Minnesota cases early filed, but we just got, days ago,  
11 information on these Plaintiffs. That information is  
12 incomplete in many respects.

13           So, the idea -- so, I am adding a practical  
14 impossibility to any summary jury trial of any  
15 individual in the summer of this year, which would be --  
16 what? Two, three months down the road. We don't have  
17 Plaintiff-specific information that would allow us to  
18 get ready for anything of that magnitude in that period  
19 of time.

20           I have heard claims and I have seen the  
21 filings that there are wrongful death cases out there.  
22 I have not seen one bit of evidence to this point in any  
23 filed case that there was a failure mechanism of an 1861  
24 that led to the death of an individual. We don't have  
25 it. So, we need background information on these

1 Plaintiffs for a whole variety of reasons, even for,  
2 yet, a whole new magnitude of reasons if they are  
3 talking about doing a summary jury trial in the spring  
4 of this year.

5 Summary jury trials, generally, we think they  
6 provide little value. Specifically, given what you have  
7 done with your scheduling order, there is no need for  
8 them.

9 The third point I want to raise is I think  
10 there are, in many respects, practical impossibilities  
11 of getting them -- any individual Plaintiff's case up  
12 for summary jury trial in the next many months, because  
13 we just haven't received the information.

14 MR. ZIMMERMAN: Your Honor, at this point we  
15 become a little bit -- ships crossing in the night. If  
16 the Court were to say to us, we want a summary jury  
17 trial on a death case. We will find if there is a death  
18 case, and we will give all of the information on that  
19 death case that is needed, or is available, to the other  
20 side.

21 But, to say because only 85 of the 169  
22 Plaintiff Fact Sheets have come in, which the deadline  
23 was March 1 for that to happen, and that somehow those  
24 Plaintiff Fact Sheets on all 169 cases does not drive  
25 home the point that if we pick a case and we exchange

1 information on it, we could be prepared in the summer  
2 for a summary jury trial. It really is sort of a  
3 logical -- it doesn't make sense. If they wanted to  
4 pick a death case and they said, we want a summary jury  
5 trial in a death case in the summer of 2000 -- we are  
6 willing to do that. We will find them a case, or the  
7 Court can select the case, and we will exchange the  
8 information so we can be prepared.

9 But, to say that they have to have  
10 information on every case in the MDL before you can have  
11 a bellwether or a summary jury trial just really doesn't  
12 flow by logic.

13 What I would like to say to the Court is we  
14 do have 85 Plaintiff Fact Sheets that have been filed  
15 and have been served, and that is as of that March  
16 deadline, which were the cases that were on file and due  
17 to have their Plaintiff Fact Sheets filed on March 1st.  
18 And I think that is a pretty good response.

19 Now, Mr. Pratt may say they are not complete,  
20 they don't have all of the information, they don't have  
21 this, that or that. But, we want to work with them to  
22 make sure they are complete. It is the obligation of  
23 Plaintiffs' lawyers to make them complete. And if they  
24 have got problems with them that they are not complete,  
25 we will work with those Plaintiffs' lawyers to get that

1 information complete. There is no desire to keep that  
2 information from being complete. But, we don't have the  
3 ability to quality control everything that is filed by a  
4 lawyer in whatever jurisdiction they may have filed  
5 their original case and tagged along and brought into  
6 this MDL.

7 But, to the point, we can do it. The Court  
8 thinks it is a good idea to have a summary jury trial.  
9 We can get the information on those particular people to  
10 tee that up in the summer or whatever date the Court  
11 would like to see it happen.

12 MR. PRATT: Your Honor, I will stop the ping  
13 pong, here. I just want to make this point, that what  
14 Mr. Zimmerman just described is the very process you put  
15 in place for the bellwether selection process, which is  
16 now delayed -- it was to have been done in February, and  
17 now it is delayed for all kinds of, I think, legitimate  
18 reasons I'm not criticizing anybody, least of all my  
19 colleagues on the Plaintiffs' Steering Committee. But,  
20 I think the idea of selecting a case and focusing in on  
21 that case and getting it ready for trial, it is going to  
22 be ambitious enough to do that for a March trial of a  
23 bellwether case. The idea that we are doing it for  
24 March bellwether trials, and in addition we are building  
25 up a process to try and get some summary jury trials

1 done in the summer of this year, I just don't think we  
2 can do it.

3 Keep in mind, the discovery process,  
4 according to your Pretrial Order number five is not  
5 going to end in the summer of this year it is going to  
6 continue into the fall. So, I think we ought to keep  
7 the bellwether process as it is, not engage in any  
8 summary jury trials at this point, because I don't think  
9 we can do it.

10 THE COURT: If you are going to move on,  
11 then?

12 MR. ZIMMERMAN: Yes.

13 THE COURT: Before we move on, just let me  
14 respond to that. Without reaching the issue of is it  
15 practically or reasonably doable to -- apart from  
16 whether it would be useful or not, I will comment on  
17 that for the summary jury trial, I won't give a clear  
18 yes or no.

19 We don't have them scheduled. However,  
20 without making any decision today on whether such a  
21 process would or would not interfere with where we are  
22 headed, I can tell you that really, apart from this MDL,  
23 I mean, I have used summary juries on the State System.  
24 We have as recently as a week ago used them here in the  
25 Federal Court, not in any of these cases, with our

1 normal jury panels.

2 And generally, it is by agreement. And I  
3 probably agree with both of you. I have seen cases  
4 where they have been of tremendous value and have given  
5 insight to one or more issues, and I have seen cases  
6 where it ended up being just a drain on resources and we  
7 went through the drill. Although maybe it resolved some  
8 issues.

9 My concern as we move through this and give  
10 that a careful look is, yeah, it is available. And if  
11 it seems to be prudent, certainly it is available. We  
12 can examine, because there is no agreement on whether it  
13 would be useful, and two, what would be the scope of  
14 such a trial? A larger concern I have that I would  
15 place summary jury trials in is in addition to the State  
16 and Federal coordination, there are a variety of  
17 administrative investigations going on, there's a  
18 variety of inquiries going on, whether it is related to  
19 the FDA, you know, U.S. Attorney's Offices, and it is a  
20 proper use of my discretion, and I have done so, as I  
21 think I have communicated to the lawyers in the two  
22 committees, not to influence these processes, but to  
23 just remind these different agencies that I asked them  
24 to proceed with the thought in mind that, without  
25 intending to, they may be adversely affecting individual



1 Plaintiffs and Defendants.

2 In other words, as you all well know here,  
3 and it should be apparent by some of the orders on the  
4 website, you know, we have an issue of -- Guidant's view  
5 is we have 100 plus employees dedicated to meeting  
6 discovery demands, whether it is a U.S. Attorney in  
7 Minnesota, or New York, or the FDA.

8 Well, those folks all need to be reminded in  
9 an appropriate way, and they have been. That, well,  
10 people do what they have to do. But, anything that  
11 distracts from trying to deal with large numbers of  
12 cases and plaintiffs could have this unintended adverse  
13 affect.

14 Well, I view -- that is a decision that the  
15 two of you don't agree on. Well, a summary jury trial  
16 is just another example of that. That is really the  
17 issue, because I have some responsibility to move this  
18 along, although I don't subscribe, never have, never  
19 will, to the rocket-docket mentality. Because if the  
20 case is managed properly, you shouldn't ever need to  
21 resort to those type of management tactics to make a  
22 case get to trial, as long as I am working with the  
23 lawyers. So, we will see. I mean, it is available. We  
24 will see as the case rolls out.

25 On the master complaint, and answer,

1 especially in light of the exchange, I haven't ordered  
2 it until now. I will sit tight and see how the exchange  
3 goes. I think you have all suggested you are going to  
4 take a close look at it in the next couple of weeks.  
5 And before we are done this morning, I will give you the  
6 two dates that we discussed for -- if I haven't already,  
7 for the next couple of meetings we have. So, I will  
8 note the concerns voiced by all parties.

9           The class certification issue may be less  
10 complicated because the real issue is, well, if it would  
11 be helpful to move things along, there probably are  
12 certain things we can do in class issues that won't  
13 interfere with what has come to be known as the  
14 bellwether approach or the representative case approach.

15           So, we will just keep an eye on it, as long  
16 as we are seeing each other fairly frequently, nothing  
17 is going to get too far down the road here. All right?

18           MR. ZIMMERMAN: Yes, thank you, Your Honor.  
19 Status of discovery, reports on matters addressed and  
20 stipulated orders and discovery matters. I am not sure  
21 how we want to address this. I think Seth is probably  
22 going to discuss the specifics of the status, and any  
23 particular problems that exist, if any.

24           MR. LESSER: In light of the Court's Order on  
25 discovery, we are certainly moving into real, sort of,

1 discovery in the sense that depositions are being  
2 noticed, documents are being produced, and according to  
3 the order of March 2, documents are to be produced, but  
4 I think actually the reports that were referenced in the  
5 agenda are some of the items from that specific order  
6 which I think Defendants are supposed to update the  
7 Court on -- at least some of them are.

8 THE COURT: That is true.

9 MS. MOELLER: Judge, do you want me to go  
10 through each one of these and give you a status as to  
11 where we are? That is what I was planning to do, but if  
12 it's -- just stop me if that is not exactly what you  
13 want.

14 THE COURT: Let's head that direction,  
15 because I think it may be, even on some of these status  
16 reports, I may be aware of, may not be, I think it is  
17 helpful to the other -- well, for two reasons, frankly.  
18 One, for the people that are here, and whether there's  
19 people here or not, a transcript gets generated and goes  
20 up, so it kind of updates all sorts of people. So --

21 MS. MOELLER: On the issue of the 43  
22 observation and response documents, we reproduced those  
23 documents on February 23rd in the manner in which they  
24 were submitted to the FDA.

25 On number two, documents reproducing

1     spreadsheets in response to the Rossinni subpoena.   14  
2     of 18 were produced on March 3rd.   There are some  
3     intensive redactions -- time-intensive redactions that  
4     need to take place and are remaining and that is in  
5     process.   And we are working to get those out the door  
6     later this week or the first part of next week.

7                 THE COURT:   May I ask a question?   I hope by  
8     asking the question, I don't open something up that  
9     would go beyond, I think, the scope of this conference,  
10    but I was thinking in light of a couple of conferences  
11    we have had -- we didn't discuss it this morning, but it  
12    came up at a minimum on one of our phone conferences  
13    where we were together, Judge Boylan and I were in our  
14    Chambers together.   We were trying to have a focus, and  
15    this is on the redaction issue, that those redactions  
16    would be essentially predicated on privilege issues,  
17    versus relevance issues, so we could maybe streamline  
18    this thing.   Is that remaining an issue?

19                MS. MOELLER:   We have streamlined the  
20    redaction issues significantly, Judge.   In addition to  
21    privilege, it would be patient names, or other privacy  
22    matters that would need to be redacted.

23                THE COURT:   Yes, we discussed that.   All  
24    right.

25                MS. MOELLER:   Number three, other

1    spreadsheets in readable format.  There are issues  
2    with -- there is a time-consuming process that we need  
3    to do to reconfigure some of the spreadsheets.  And that  
4    is all in process.  We have -- we reproduced all of the  
5    McCoy, now, but one of the Nuernberg spreadsheets on  
6    March 3rd, and there are -- that one should be produced  
7    today.  And so, we are, I think, up to date on number  
8    three.

9                    On number four, we have been meeting and  
10    conferring on this, and I think we have come to  
11    resolution on number four.

12                   THE COURT:  Maybe just for the record you  
13    could note what number four is.

14                   MS. MOELLER:  Which is issues related to  
15    project files, CAD files, linked documents, PowerPoint  
16    files, so that issues regarding incomplete or unreadable  
17    production of such documents can be resolved promptly.

18                   The next one is agreed upon protocol for the  
19    production of electronic discovery on a going forward  
20    basis.  And I believe that we are still negotiating this  
21    and it is almost in final format.

22                   THE COURT:  And I would acknowledge that two  
23    letters have come in, either jointly addressed, or to  
24    Judge Boylan indicating just that, that you are close to  
25    resolution on that.  So --

1 MS. MOELLER: Information regarding files  
2 from which produced documents were collected and  
3 produced, that information was provided on March 1st on  
4 documents that had previously been produced.

5 On number seven, Randy Nuernberg documents,  
6 we produced over 83,000 documents on February 23rd and  
7 24th.

8 On all the McCoy documents, we have produced  
9 over -- about 45,000 pages in response to that. We need  
10 to supplement some newly-loaded documents that our  
11 vendor discovered and we were unaware existed, and we  
12 are in the process of trying to get those out as quickly  
13 as we can.

14 The next set on number nine, other custodian  
15 files, we anticipate producing Dale DeVries' files  
16 today.

17 We are -- Ren Russie will be next and he will  
18 be produced a week from today. And we discussed the  
19 ongoing process of that.

20 THE COURT: Yes, and you were more polite  
21 about it than you probably need to be. The discussion  
22 was, for those in the room, on number nine, because this  
23 is out on the web, the last order, there was a disputed  
24 issue on production of these documents.

25 And so, I went ahead and made the ruling,

1 rolled it into the order, and adjusted the date. But, I  
2 didn't adjust the effect that had on the ratio of the  
3 files that needed to be produced per week when I moved  
4 the date further out than Plaintiffs wanted, but sooner  
5 than the Defendants. So, I will take care of that with  
6 the comments in mind from both of you this morning.  
7 Because it was my mistake, nothing that counsel did.  
8 So --

9 MS. MOELLER: Number ten, what you just  
10 inquired about, Your Honor, the overly broad relevancy  
11 redactions, that review is underway and we are producing  
12 today corrected documents that had been previously  
13 produced.

14 Number 11, all PMA forms and drafts of PMA  
15 forms, further advise of that issue by March 13th. And  
16 we are on track to meet that deadline.

17 On number 12, the documents that we will rely  
18 upon on the preemption motion are due at the end of --  
19 on March 15th, and we are on track to meet that  
20 deadline.

21 The 13th, super priority requests, we have  
22 efforts underway on all of the priority requests, and  
23 are working diligently toward getting those. In terms  
24 of non-recall related and non-produced trend reports, we  
25 are pulling these documents and sending them to our

1 vendor and they are in the process of being loaded. And  
2 we are -- which will put them into the review process.

3 Engineering change orders for the 1861 will  
4 be produced by next Wednesday. The volume is  
5 approximately 78,000 pages. For the RENEWAL 1 and 2,  
6 those will follow as soon as we can work them into the  
7 line at our vendor.

8 Product performance reports have already been  
9 provided for all of the devices at issue. Project files  
10 have been produced through November, and the delta docs,  
11 or the docs between November and today, we are going to  
12 try to produce them for the 1861 and the RENEWALS today.

13 Call log reports, the volume is unknown.  
14 That is in line to start pulling as soon as we get the  
15 trend reports, event summaries, and other things that  
16 were listed in the first one collected.

17 Return product reports were -- this is a huge  
18 undertaking, and we are still evaluating what the volume  
19 of this is going to be. And we will have to provide  
20 further information. Same on the communications, the  
21 CRM event at Guidant.com. Implant forums and device  
22 history reports for named Plaintiffs, we are in the  
23 process of collecting those, and I believe we are trying  
24 to figure out our production schedule, with the  
25 Plaintiffs on that.



1           Post-approval studies, we have now identified  
2 all of those and so we are in the process of getting  
3 those collected so that we can put them in the review  
4 line.

5           We are looking to get -- we have already  
6 collected and produced some of the training for the  
7 sales forces on the devices, however we are still  
8 collecting hard copy documents from some of the actual  
9 sales reps who have hard copy documents. So, those will  
10 be put in line.

11           We are working with the client to identify  
12 component suppliers. We will produce documents  
13 previously provided to Senator Grassley by next week,  
14 and documents responsive, HRS documents will be reviewed  
15 and produced to Plaintiffs within the next couple of  
16 weeks.

17           So, that is an update on -- oh, I skipped  
18 ahead. 14 is the Grassley documents which I just told  
19 you about. The HRS documents are coming within the next  
20 couple of weeks.

21           We are still in the process of reviewing  
22 number 16, which is four medical bodies and agencies for  
23 which they seek production by Defendants of documents  
24 related to those entities. The timing of production on  
25 number 17, we are -- our marketing share drive has been

1 gathered, processed, and loaded, so it is a matter of  
2 reviewing those and getting those out the door.

3 We are still getting, as I said, the hard  
4 copy documents from the sales force. We are still  
5 gathering e-mail in new drives and sending those to the  
6 vendor. We still need to go to Clonmel, Ireland, as  
7 soon as we get some vendor issues resolved with  
8 obtaining a large amount of documents at one time. And  
9 we are still in the process of collecting information  
10 from the Finance Group to get information on those  
11 requests.

12 On number 17 we are not withholding any  
13 otherwise responsive documents on the basis that they  
14 reference information outside the United States.

15 Additional recent productions, we've produced  
16 documents from three other custodians, Dr. Joe Smith,  
17 Alan Gorsett and Paul Stone. And those total, roughly,  
18 40,000 pages.

19 THE COURT: Thank you.

20 MR. LESSER: That was a lot of information,  
21 obviously.

22 THE COURT: Yes, it was.

23 MR. LESSER: What it boils down to from the  
24 Plaintiffs' perspective is, after being told this can't  
25 be done, amazingly enough, when Your Honor put it in an

1 order, it is being done. There is obviously slips of a  
2 few days here or there, but it is being done.

3 What this also demonstrates on the broader  
4 level is that the deadlines we believe we proposed for  
5 discovery are eminently, really, quite reachable.

6 In other words, a substantial part of the  
7 1861 story is being produced with some success -- what  
8 we believe will be produced this month, we will know  
9 when we see it. Depositions are being scheduled for  
10 early April, late March, early April. And the entire  
11 1861 set of documents, issue 17, it appears that  
12 Guidant, assuming what we heard today is correct, is  
13 right on top of it. So, it is indeed quite possible  
14 that the issues, such as moving forward in this case  
15 expeditiously really can be met, and are being, we hope  
16 and believe now, met.

17 Whether or not when we receive these  
18 documents we will know what is or isn't complete, we  
19 obviously can't speak to, the Plaintiffs can't speak to.  
20 For example, redactions are still an issue. We have  
21 received new productions with yet more redactions. We  
22 have pointed them out and Guidant has agreed that some  
23 of them appear not to be correct. So, how much time  
24 will be dealt with that, we don't know.

25 There will be issues we will be bringing to

1 Your Honor, that is quite clear. For example, the two  
2 sides have a quite apparent disagreement as to what is  
3 permissibly redactable information, such as doctors'  
4 addresses, cell phone numbers, things that would  
5 otherwise, we believe, not be redactable, particularly  
6 because we have a Confidentiality Order in this case  
7 that would cover those issues. So, we expect there will  
8 be some discovery issues of that sort arising, but in  
9 substantial measure, in light of the order, we are  
10 moving forward into discovery. And whether or not we  
11 will have issues as to completeness, issues as to  
12 redactions, issues as to privilege, we don't know yet,  
13 but I do think it underlines the primary theme which  
14 Ms. Cabraser stated, Mr. Zimmerman stated, we can  
15 actually move this case.

16 We could -- on issues of liability, we chose  
17 the dates, for example, of summary jury trials for the  
18 summer, recognizing we wouldn't have complete discovery  
19 completed by then, but we would have substantial far  
20 greater knowledge on the Plaintiffs' side as to the  
21 liability discovery. It is not the Plaintiff-specific  
22 discovery that takes a great deal of time, because it  
23 really doesn't. It is really the Defendant's liability  
24 discovery that takes time. And it does appear that we  
25 are moving forward expeditiously on that.

1                   THE COURT: I just saw this strained look on  
2 Mr. Pratt's face. We will see.

3                   MR. PRATT: It is like in chess. You just  
4 wonder where if you don't say something, then they'll  
5 come back and say checkmate somewhere down the road. I  
6 think we made tremendous strides, and I appreciate Mr.  
7 Lesser and others for, I guess, complimenting us a  
8 little bit on getting things done, because we are  
9 working at it.

10                  But, Your Honor, I have said before, this  
11 process of gathering information from thousands of  
12 employees off of computers and shared drives and e-mail  
13 servers and getting it in place to getting it reviewed  
14 and getting it, you know, analyzed for privilege or not,  
15 and off to the Plaintiff's counsel's camp, I don't want  
16 you to think that we are nearing the end of that  
17 process. We are gathering documents every day that need  
18 to be put into the process and reviewed. And some of  
19 those documents relate to the 1861.

20                  We're talking about custodian files. We're  
21 talking about files way beyond the custodian files. So,  
22 we are working. We have produced thousands of pages of  
23 documents. We have gathered and are in the process of  
24 reviewing many millions more of pages of documents.

25                  So, I think that it may be overly simplified

1 to say we are sort of nearing the end of getting the  
2 documents on the 1861 story. We continue to get new  
3 requests, by the way, but I just wanted Your Honor to  
4 understand and appreciate that this is an overarching  
5 process. And I think we have made great gains in the  
6 relatively short life of this litigation. But, that is  
7 not to say that, though I wish I could say it, that the  
8 sun is setting on the discovery.

9 THE COURT: I wasn't getting that feeling,  
10 but --

11 MR. PRATT: Okay, I just don't want to  
12 stipulate with Mr. Lesser.

13 MR. LESSER: We're working on our potential,  
14 on the Plaintiffs' side, to suggest that we believe the  
15 sun is setting.

16 THE COURT: Thank you.

17 MR. ZIMMERMAN: As long as the sun still  
18 rises in the east and sets in the west would be all  
19 right, I guess.

20 Status of ADR, Your Honor, is the next topic.  
21 As you know, everyone knows, that Judge Boylan has been  
22 appointed the ADR neutral. And --

23 THE COURT: If I could just interrupt, I  
24 apologize. For those of you, and I don't mean to offend  
25 anyone in the audience, if they are saying, well, the

1 Judge just said something that assumes we haven't read  
2 the Order on the web, but what I set up in there in  
3 consultation with Judge Boylan on the scope of his  
4 involvement and the mode of contact, ex parte and  
5 otherwise, it is all in the order. There are no  
6 unwritten rules.

7 It is in the Order on the approach, the way  
8 in which each side approaches him and the way in which  
9 that information is not passed through to me, it is in  
10 one of the orders. So, for those of you that haven't  
11 read it that are wondering, well, what are they talking  
12 about? Well, it may not cover everything, and it  
13 doesn't, but the ground rules were set up in the Order.

14 MR. ZIMMERMAN: Correct, Your Honor. And I  
15 think just for purposes of people knowing what has  
16 happened is that the Judge directed that we provide  
17 Judge Boylan as the ADR neutral, that we provide to him  
18 ex parte communication, or one-party communication to  
19 him regarding our view of how ADR can work from the  
20 Plaintiffs' side and the Defendant's did the same. And  
21 there is critical mass moving in the ADR arena, although  
22 we have nothing at this time to report about the  
23 conclusions of that.

24 We are proposing and have been proposing our  
25 points of view to the Court to Judge Boylan. He is

1 reviewing it. He is meeting and talking to us about it.  
2 And we are optimistic that with his help and with good  
3 faith efforts, ADR can be very fruitful and helpful in  
4 resolving all, or a portion, or issues, or matters of  
5 disclosure.

6 And so, we believe in the process. We  
7 wholeheartedly believe that in a case such as this where  
8 we are working with health issues, that we can help  
9 resolve by getting good information out and getting to  
10 the end of the case early, that the process of ADR can  
11 be of great benefit to the parties, to the Plaintiffs,  
12 and to the Defendants, and to the public at large who  
13 are at risk.

14 THE COURT: Anything on that, Mr. Pratt?

15 MR. PRATT: No, not really. Guidant believes  
16 that we have valid and sustainable defenses to the  
17 claims raised in this litigation. I have nothing more  
18 to add on the ADR context beyond what we have discussed,  
19 Your Honor.

20 THE COURT: All right.

21 MR. ZIMMERMAN: Defendant Fact Sheet is  
22 separate, as separate from Plaintiff Fact Sheet, I  
23 believe the status of Defendant Fact Sheets is, we're a  
24 very small agreement away, or a small time away to  
25 getting a Defendant Fact Sheet that we agree on, submit



1 it to the Court for approval, and get the information  
2 contained in the fact sheet provided to us.

3 I don't know that we need to make anymore  
4 comment? No more comment on that.

5 And Plaintiff Fact Sheets, as I did report to  
6 the Court, the March deadline has occurred. 85  
7 individual Plaintiff Fact Sheets have been provided to  
8 counsel. There was a change of address and who we were  
9 to provide it to. Originally, we were providing it to  
10 the defense, to Joseph Price at the Faegre & Benson  
11 office. He asked that we move that over and provide  
12 that to the Shook Hardy Office in Kansas City.

13 And we sent an e-mail out to every lawyer  
14 saying to correct it going forward, making sure it goes  
15 to the Shook office, and we are happy to accommodate  
16 that. We expect on a rolling basis these will come  
17 forward.

18 And Your Honor, there will be problems with  
19 the Plaintiff Fact Sheets. We don't have quality  
20 control as the PSC over what is provided, but I want to  
21 work with the Defendants to make sure if they have  
22 deficiency problems or there are things that aren't  
23 there that they need, that are required, that we will  
24 work with them and put pressure on the people to provide  
25 that information in any way that is humanly possible.

1 Proposed order relating to doctors --

2 MR. PRATT: Excuse me. We should put one  
3 thing on the Plaintiffs' Fact Sheet, Your Honor. There  
4 are some deficiencies. We are sending out deficiency  
5 letters. We are going to follow the procedures in place  
6 with dealing with those issues. I would hope in the  
7 spirit expressed by the lead counsel for the Plaintiffs,  
8 that they don't stand, necessarily, by sort of -- we  
9 have got 20 to 30 days to respond to that when they get  
10 a deficiency letter.

11 I would hope in the spirit of getting us  
12 information as quickly as they want information from us,  
13 that we can move the discussion process expeditiously,  
14 so if there are deficiencies, we get them corrected  
15 forthwith. We will be working with the Plaintiffs'  
16 counsel to try to resolve the issues we have with their  
17 submissions on the fact sheets.

18 MR. ZIMMERMAN: And we stand ready to work  
19 with Defense on that.

20 Our proposed order relating to Defendant's  
21 contact with doctors. I'm not sure of the status of  
22 that.

23 MR. LESSER: In light of the Plaintiff's Fact  
24 Sheet and the authorization at the back, there were a  
25 number of Plaintiffs' lawyers about the country who

1 raised the issue that under State law it is not  
2 permissible for a defendant to engage in 101  
3 conversations with the Plaintiffs' treater, Plaintiffs'  
4 treater/doctor. And indeed, for example, in the Baycol  
5 Litigation there was a PTO entered prohibiting such  
6 contacts.

7 Plaintiffs have brought it up with Defense  
8 counsel and they have agreed that that is indeed the  
9 state of the law and they have agreed not to contact  
10 Plaintiffs' treating doctors in that capacity, one on  
11 one, ex parte, as it were. And we are working on a  
12 proposed order.

13 We submitted, I believe, to Your Honor a  
14 proposed order; but, there's one or two nuances that we  
15 are trying to nail down. So, I would hope, probably  
16 within a matter of days, to have a completed, a revised  
17 proposed order on that, which will be mutually agreeable  
18 to the parties addressing the issue. I believe that is  
19 correct.

20 MR. PRATT: Mr. Lesser is right, that we are  
21 trying to work through this process. And I think we are  
22 moving down the path of perhaps reaching an agreement on  
23 it.

24 I wouldn't necessarily say that we have  
25 agreed that we are not allowed to have ex parte

1 communication with any treating doctor in any state,  
2 anyplace in the country on any issue. I think that is  
3 why we are engaging in discussions, to find those  
4 circumstances under which we may be allowed to do that,  
5 circumstances in which we may not. But, we want some  
6 clarity, we all do, on what we can do and cannot do.

7 So, I don't know that we have really thrown  
8 out the gauntlet, and said yes, no, whatever, but we are  
9 certainly in discussion with them to try to resolve it.  
10 I think we will, actually.

11 MR. LESSER: At least, from the Plaintiffs'  
12 perspective, we believe that you are not contacting any  
13 Plaintiffs' treating doctor at the moment, correct?  
14 That is about what I think we have agreed upon, correct,  
15 that line, in the capacity as a treater?

16 MR. PRATT: Yes, we are not contacting any  
17 treating doctor in his or her capacity as a treater  
18 until we have resolved this issue.

19 MR. LESSER: And if we don't resolve it, Your  
20 Honor, we might wish to come to the Court on some  
21 expedited basis to see if we can't, if we need to.  
22 Thank you.

23 THE COURT: Fair enough. I assume that is  
24 what you would do if you don't get it resolved, so -- I  
25 think we covered the --

1                   MR. ZIMMERMAN: Yeah, we have covered it,  
2 Your Honor. I did not see it on the agenda, and I'm  
3 sorry, I did take it out of order.

4                   THE COURT: That's all right.

5                   MR. ZIMMERMAN: Prospective discovery cut-off  
6 date, what is that?

7                   THE COURT: Well, you both submitted -- those  
8 proposals that you submitted to me?

9                   MR. LESSER: No, just to go back one step,  
10 item number 8, the proposed order that we submitted is  
11 mutually agreeable so it can be entered, at least from  
12 the Plaintiffs' perspective, obviously. You may do what  
13 you wish.

14                  THE COURT: I think you both indicated that,  
15 probably, this morning; that is fine.

16                  MR. LESSER: Number nine is a matter of  
17 when -- it has to do with in terms of searching for  
18 responsive documents to document requests and the other  
19 discovery issues, whether there is a date, in order to  
20 expedite and move matters along beyond which Plaintiffs  
21 are comfortable with saying, here is the day you can  
22 stop looking for matters.

23                  Now, obviously, there are always going to be  
24 spillover matters, and this morning we actually reached  
25 an agreement on that issue, so there is actually nothing

1     disputed there, either.

2                   THE COURT:   All right.   Well, I think that  
3     leaves, unless there is -- apart from the remand  
4     motions, that leaves, unless there are add-ons, the  
5     motion to compel production of the independent panel  
6     documents which there have been written submissions,  
7     including memos by both parties.

8                   And I think it was my understanding, I won't  
9     hold it to you, that there may have been some requests  
10    this morning for brief oral argument on that issue.   I  
11    will leave that to the discretion of counsel, because I  
12    have already committed whether there is or isn't, to  
13    rolling that into -- maybe you will decide everything  
14    that has been said, that we have already said it,  
15    because I have already agreed to roll that out in an  
16    order with everything else at the end of the week.  
17    So --

18                  MR. PRATT:   From our perspective, Your Honor,  
19    we don't need to have oral argument.   If they wanted to  
20    say something, I think we might have something to say in  
21    a response, but we really have, I think, briefed it  
22    fairly --

23                  THE COURT:   Yes, and I read the briefs.   And  
24    I don't really have any questions.   And if I do, I think  
25    they have been answered by what you have each submitted.

1 MS. STRIKIS: Thank you, Your Honor.  
2 Plaintiffs', also, agree to stand on their briefs.

3 THE COURT: Thank you.

4 MR. ZIMMERMAN: That leaves us then to the  
5 remand motions, Your Honor, and then the schedule of the  
6 next conferences. There may be people in the courtroom  
7 that aren't at issue -- I mean, don't have a horse in  
8 the race having to do with remand, so maybe if you could  
9 go to 12 and set the dates, and then remand can be  
10 discussed by those who have an issue with it.

11 THE COURT: Consistent, or substantially  
12 consistent, with the prior orders of the Court in terms  
13 of how we are going to schedule and what we have agreed  
14 to do, I will set the next conference like this, meaning  
15 live, if you will, in court, Wednesday, April 19th, at  
16 9:15.

17 The only change is the 9:15, from 9:00, so I  
18 don't take advantage of some of your time when you have  
19 been promptly here at nine and we have still had these  
20 get-togethers where they have gone a bit past nine.

21 On Wednesday, take a look at the website, or  
22 as you come in, the kiosk. It will be in this building.  
23 Because, as you know, we move around a bit, depending on  
24 courtroom availability. So, it would be the 19th of  
25 April at 9:15. And as before, the meeting with lead

1 counsel to commence at 8:00.

2 And then the telephone conference that wasn't  
3 requested, and we are not implying that everybody agree  
4 on the timing, but what I set up was to do at least one  
5 in the off week, or in between if there were unaddressed  
6 discovery issues.

7 And so, I will set that for -- and I know  
8 that time sends shivers when we have got more than  
9 Central Standard Time to be worried about, but, April  
10 5th at 8:00 a.m., Central Standard Time. And we will  
11 have that set up as we did.

12 I thought it worked well the last time. I  
13 will designate an hour if we need it. As I think back,  
14 we went longer than that the last time.

15 MR. ZIMMERMAN: It was Pratt's fault, Your  
16 Honor. He talked too much.

17 THE COURT: I think he said something to the  
18 contrary. So, then, if we need it, we have got it. And  
19 you know, I have assumed, and I think all of the lawyers  
20 are aware of this, while I don't want to become the  
21 enabler, I think all of the lawyers have really kind of  
22 addressed what I am going to say, so I should just say  
23 it at the time, and save my time. If other issues have  
24 come in in between these dates, I don't believe that  
25 there has been an issue with when contact has to be



1 made. It has been made. And if there are some  
2 identifiable problems that have come up about  
3 communication, I think they have been relatively minor.

4           One of the issues that our chambers have had,  
5 and I will take responsibility, because it is my  
6 chambers. We sometimes, on issues, to make sure we give  
7 the same answer to the same group of people and  
8 hopefully substantially consistent with  
9 similarly-situated cases, with other MDL's here and  
10 elsewhere, our kind of clearinghouse is Lou Jean  
11 Gleason. Sometimes we will consult and get back to you,  
12 whether it is Lowell or Laura. And so, I haven't really  
13 identified any major issues. And I will never take  
14 offense if someone points out to me, you know, just so  
15 you are aware, Judge, what we were told today by you, or  
16 your staff is not what we were told by so and so on the  
17 same issue. Unless we are told that, well, you are  
18 handling two similar issues in a different way, we may  
19 not be aware of it. If it is our responsibility, we  
20 will correct it. Whether there has been other  
21 communication issues, I'm sure everything doesn't work  
22 perfectly, but I really haven't identified any, so --

23           MR. ZIMMERMAN: I think from our perspective,  
24 Your Honor, the Plaintiffs' perspective, it has worked  
25 very well. And your chambers and personnel have been

1 extremely responsive.

2 THE COURT: We are learning along the way on  
3 how to consistently handle these issues, plus get them  
4 out on the web and keep everybody informed so they are  
5 not out of the loop. So --

6 MR. ZIMMERMAN: Your Honor, you spoke with us  
7 in chambers about the Wright motion. I don't know if we  
8 announced in court that it was not going to be heard  
9 today.

10 THE COURT: Is counsel here?

11 MR. HOUGE: Yes.

12 THE COURT: Yes, I thought so. Whether we do  
13 it now or at one -- we could just as well do it now. I  
14 told the lawyers in chambers this morning, because  
15 probably most of them there didn't know it except for  
16 those specifically involved in the case, that the  
17 request was made to hear -- well, there was more than  
18 one request, but the request was made on Mr. Wright's  
19 motion to hold a status conference.

20 And I had Lowell call the parties yesterday  
21 saying, I won't hear it at 1:00 today, but let's get a  
22 briefing schedule, with or without the Court's  
23 involvement, get the briefs in. And then either with or  
24 without oral argument, and that schedule should be on an  
25 expedited track. And if they can't agree to what it is,

1     then I will set it and get the briefs in.

2                   And then with the same calendar priority,  
3     either notify you that I am going to issue a ruling  
4     without oral argument, or set it for oral argument,  
5     which necessarily wouldn't have to be one of these days.  
6     So, we can take care of that now, or maybe you haven't  
7     had a chance to talk with counsel.

8                   MR. PRATT:   We haven't, Your Honor.   Let me  
9     suggest a lot of people here really aren't -- one thing  
10    I might suggest, and I will talk to Mr. Houge about it  
11    is, you know, maybe we could meet with you back in  
12    chambers and to through this and talk about some of  
13    these things.   Then if we need to raise it at one and  
14    argue it, we can.   But, it seems to me we might be able  
15    to reach some agreement on a briefing schedule.   I mean,  
16    I will do, of course, whatever you want and whatever Mr.  
17    Houge suggests.

18                  THE COURT:   Well, there is another issue,  
19    too.   There is an issue, apart from the motion today, I  
20    am sure there are some issues -- and we don't need to  
21    consume the time of the people in here.

22                  Well, what does it mean when two judges, in  
23    this case Judge Rosenbaum and myself, sign a related  
24    case order, does that mean consolidation?   And the  
25    answer is, not necessarily.   It means one judge is going

1 to coordinate the cases. As I said this morning to the  
2 group, even if there was no MDL here, if these two cases  
3 came in, we would have done a related case order. And  
4 what that means varies from each and every case, except  
5 for some value in one judge coordinating and handling  
6 the matters.

7 So, we can probably discuss that briefly, as  
8 well. Are there other matters, either from Lead Counsel  
9 Committees or other lawyers in the room? This has  
10 worked fine the last -- well, I seemed to have not lost  
11 control during these meetings, of course maybe that  
12 is in the eyes of the beholder. So, I see two hands up.  
13 Come right up to the podium, if you would?

14 MS. NELSON: Your Honor, my name is Kirsten  
15 Nelson. I am from Sherman and Sterling. And I am here  
16 on behalf of Boston Scientific. I actually did not know  
17 about the Court's Order. So, I would just ask if we are  
18 going to a conference in chambers, that we can discuss  
19 the Court's Order what that means for the Boston  
20 Scientific case in terms of the briefing schedule in  
21 that case.

22 THE COURT: Because yeah, what I said was the  
23 motion that Mr. Wright had was on actually these  
24 other -- the individual case for motions, that I  
25 actually said would be heard today at one. So, more out

1 of -- well, for a variety of reasons, good old-fashioned  
2 common courtesy would be reason enough to have called.  
3 And then, there's no calls been made to anybody,  
4 including counsel, Mr. Houge, for the individual case on  
5 the Boston Scientific. But, I don't claim ignorance to  
6 the fact that there are discovery issues. And even if  
7 there are no discovery issues. There is immediacy to  
8 the request. So, yes, I'm willing to discuss that when  
9 we are done here, too.

10 MS. NELSON: Thank you, Your Honor.

11 THE COURT: Our friend from Louisiana, I  
12 believe?

13 MR. BECNEL: The only country lawyer among  
14 us. Judge, I wanted to tell you what I have done,  
15 whether it is right or wrong, I don't know. But, I want  
16 all of my cases here in Minnesota.

17 The case I have just given to the Zimmerman  
18 Reed firm to file for me, only because they are  
19 Minnesota counsel and I am not, is a case called Thacker  
20 which is from Kentucky, Pollak from Nevada, Holiday from  
21 Ohio, Lesley(PH) from Ohio, Elste from Maryland, Crouch  
22 from Ohio, and Jennings, a death case from Harlingen,  
23 Texas. They are going to be filed as a class action.  
24 Although I said one case, it is multiple Plaintiffs.

25 The other thing I wanted to bring up is

1 something that has just happened in a case here in  
2 Minnesota. I'm not saying it is good or bad. In Baycol  
3 I had 400 clients left. The Judge just issued an order  
4 that the Defendants had to do any discovery they wanted,  
5 despite the fact that they haven't done anything over  
6 the last three or four years that we have been up here  
7 and now set almost 1,200 depositions in the next 90  
8 days.

9 I would not -- and, of course, I filed the  
10 motion to quash, because they have got some of them with  
11 20 at a time in one state, and 20 at the same exact time  
12 in another state. It makes it difficult. And I want  
13 counsel to be able to -- since I plan on filing a lot of  
14 these cases every time I come here, to be able to -- you  
15 know, if he needs discovery on them, I am going to give  
16 him his fact sheets. And if he wants to take the  
17 depositions, let's do it over the year, instead of me  
18 getting jammed in a 30-day period or a 90-day period  
19 with hundreds of hundreds of depositions which, you  
20 know, it is very difficult to cover all of them.

21 THE COURT: I suppose now is not the time or  
22 place, maybe there is no time or place, but I thought  
23 Baycol was kind of winding down or out. Here we go.

24 MR BECNEL: There was a settlement, we  
25 thought, and I guess that is why they didn't do

1 anything --

2 THE COURT: I shouldn't have said anything.

3 MR. ZIMMERMAN: It is a sore subject, Your  
4 Honor, I could go on, but we had a settlement that fell  
5 out of bed, and now it is a little bit of discovery  
6 chaos. So, we don't know, but the good news is we  
7 settled 3,000 cases for \$1.2 billion around the country.  
8 The bad news is there is still about 5,000 lesser  
9 damages case that have not been resolved, many of them  
10 not going to be pursued and some of them will be  
11 pursued. And that is where the cutting is coming out  
12 right now.

13 MR. BECNEL: Mine will be pursued. I won't  
14 file a case unless it is going to be pursued. That is  
15 the only thing I'm saying, so that this Court -- and the  
16 only reason I am bringing it up is not a criticism of  
17 anybody.

18 THE COURT: I understand.

19 MR. BECNEL: It is just that when you are  
20 talking about a year date, and when I filed these cases  
21 as a group, I understand that if we don't do something  
22 and don't do business here, that they will be debundled  
23 and sent back by you to Nevada and Kentucky and Ohio --

24 THE COURT: Unless they are in a group, one  
25 or more of them are in a group by the consent of

1 everyone that we try one or more of those here, I mean,  
2 that is what it would take.

3 MR. BECNEL: That is what I am looking for,  
4 and I know they can do it.

5 THE COURT: Have I overlooked anyone? I  
6 probably have overlooked somebody, but anybody who wants  
7 something on the record? Then I want to thank everybody  
8 for the attendance.

9 And any orders that come out, whether they  
10 are multiple orders, because there are a couple that  
11 have been done by stipulation on some, what I would say  
12 are standard discovery issues, but on the motion for the  
13 independent panel information, on some modifications of  
14 any of the discovery dates and then something I said  
15 when we started this morning, on this setting up a  
16 system, because that order I did was more intended as a  
17 jumpstart, I didn't say that, on the selection of cases.  
18 That will all be out in the next few days on to the --  
19 on to the website.

20 And we do our best -- we miss a couple of  
21 things. I think I may have missed rolling out this  
22 agenda on there last Friday. So, my apologies. Where I  
23 think that leaves us, so we can make sure we are on the  
24 same page, it would be my intent to -- I think we are  
25 scheduled for 1:00 on the remand motions --



1                   MR. BURTON: Your Honor, my understanding was  
2 it was 11:00 a.m. for the remand motion.

3                   MS. WIVELL: That is my understanding too,  
4 Your Honor.

5                   MR. PRATT: From our perspective, Your Honor,  
6 we will go anytime you want, from the Defense side.

7                   THE COURT: Let me ask this, because  
8 regardless of -- because apparently there are some  
9 notices -- either way we are going to take a recess,  
10 here, and it will affect what I do with some of the  
11 other lawyers in the committees, and some of the flight  
12 schedules that people have. But, let me ask this.  
13 There are two cases set, and what I had thought -- but,  
14 I can make the change before we adjourn here for a  
15 recess, is that one or both have been set, both for one  
16 with a back-up plan, if we finish, we will go at eleven.  
17 No matter what was said, are both cases ready to roll  
18 for 11:00, on one is here?

19                   MS. WIVELL: I think we are both here, Your  
20 Honor.

21                   MR. BURTON: Both of them are. Mark Burton  
22 for Wislocki.

23                   THE COURT: All right. Well, why don't we  
24 take a, for a couple of reasons, one so I can chat with  
25 a couple of the lawyers, one on the right case, take a

1 15-minute recess. Reason enough is to give my reporter  
2 a break, and then we will proceed into the remand  
3 motions. And then I will chat with counsel here, first,  
4 lead counsel, on where that leaves us for timing and any  
5 other get-together today. And then talk with Mr. Houge  
6 and Mr. Pratt. I think we can probably accomplish that  
7 in the next 15 minutes, at least agree on a schedule. I  
8 can chat with them and counsel for Boston Scientific.

9           If you don't mind meeting, we will probably  
10 go back here to this jury room so I don't have to  
11 bother -- I think, actually, Mike Davis is not here  
12 today, so I don't have to bother Judge Doty or Judge  
13 Davis. And we don't have to go up or down to 12, or up  
14 to 15. So, let's adjourn for 15 minutes, and then we  
15 will proceed with the remand motions.

16           We are adjourned, thank you.

17           (Adjournment.)

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Certified by: \_\_\_\_\_

23

Jeanne M. Anderson, RMR-RPR  
Official Court Reporter

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